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WTO Panel Upholds Key Parts of U.S. Actions on Softwood Lumber

WASHINGTON - The Office of the United States Trade Representative announced today that a World Trade Organization (WTO) panel upheld key parts of U.S. actions in the ongoing softwood lumber dispute with Canada, agreeing with the United States that the Canadian provinces' sale of timber from public lands can constitute a subsidy under the WTO Subsidies Agreement.

The U.S. trade actions involved the imposition of countervailing duties, a special duty that the WTO allows importing countries to impose to remedy the injury caused by imported goods that have been subsidized by foreign governments. The WTO panel also agreed with the United States that U.S. laws governing reviews of countervailing duty orders are fully consistent with the WTO Subsidies Agreement.

"Although we do not agree with all of the panel's conclusions, its reasoning on the most important issue of natural resource subsidies is a clear victory for the United States," said U.S. Trade Representative Robert B. Zoellick. "Canada has long argued that its natural resource subsidies do not fall within the disciplines of the WTO and therefore cannot be subject to countervailing duties under any circumstances. The WTO has conclusively rejected the Canadian argument."

"U.S. trade laws are the most comprehensive, transparent, and effective laws in the world," said Zoellick, "Today's report does not change the United States' fundamental interest in finding a durable solution to 20 years of softwood lumber litigation. The United States remains prepared to offer Canadian lumber producers unfettered access to the U.S. market if the provinces implement market-based pricing for sales of timber from public lands."

The panel found against the United States on other issues, including the U.S. methodology for calculating the amount of the subsidy and the critical circumstances determination (a determination of an import surge justifying retroactive duties). However, today's findings will have no practical effect on the *final* countervailing duties that are currently in place. Moreover, the case has been entirely bypassed by events because the report only relates to the original *preliminary* countervailing duties, which have already been refunded to Canadian lumber producers. These preliminary duties amounted to almost \$1 billion.

In addition, the report's findings are moot with regard to the United States' critical circumstances determination. The U.S. investigation that Canada complained about continued to unfold while this

WTO case was being argued, and the United States already independently resolved this issue in Canada's favor.

Canada's WTO and NAFTA challenges to other aspects of the U.S. softwood lumber determinations are ongoing. The WTO report released today has no impact on any of the other cases. The United States will continue to vigorously defend its trade laws, and the actions it takes pursuant to those trade laws, in all venues.

Background:

The WTO panel report that was released today only addresses the United States' August 9, 2001 preliminary countervailing duty determination. Canada requested WTO consultations regarding the preliminary countervailing duty determination on August 21, 2001. The WTO panel was established on December 5, 2001. In addition to this WTO proceeding, Canada has also contested the United States' final countervailing determination at the WTO. That proceeding is now underway.

In its report, the panel made the following findings:

- The panel agreed with the United States that the Canadian provincial governments' sale to lumber producers of timber from public lands constitutes a "financial contribution" by the government that can give rise to a subsidy under the terms of the WTO Subsidies Agreement.
- The panel also agreed with the United States that the provisions of U.S. law governing expedited and administrative reviews of final countervailing duty orders are consistent with U.S. obligations under the WTO Subsidies Agreement. The panel rejected Canada's argument that U.S. laws preclude company-specific reviews in cases, like this one, where, because of the large number of exporters, the Commerce Department calculates a country-wide rate rather than company-specific rates.
- The panel found against the United States with respect to the particular methodology used to calculate the amount of the subsidy. In its preliminary determination, the U.S. used prices for comparable standing timber in contiguous U.S. states as the benchmark to measure whether the government timber prices in Canada are below market, *i.e.*, provide a subsidy benefit. The panel found that this methodology is inconsistent with the WTO Subsidies Agreement. The panel also found that the U.S. improperly assumed that the subsidy provided to timber harvesters passed through arm's-length sales to downstream users of timber.
- Finally, the panel found against the United States with respect to the retroactive imposition of provisional remedies based on its preliminary determination that "critical circumstances" exist in this case. A critical circumstances finding triggers a special remedy, allowed under the WTO Subsidies Agreement, for injury resulting from import surges occurring before countervailing duties are normally imposed. This remedy allows duties to be imposed on imports that enter during the 90-day period before the

publication of a preliminary determination. The Panel found that, under the WTO Subsidies Agreement, this remedy cannot be applied until a final determination is made.

Both parties may appeal today's report. The United States will review the report in full before making a decision on appeal.

The panel report will be posted on the WTO website (www.wto.org). The briefs that USTR submitted to the panel in the dispute are available on the USTR website at www.ustr.gov/enforcement/briefs.

The timeline of the U.S. softwood lumber determinations is as follows:

April 2, 2001 - The U.S. lumber industry filed antidumping and countervailing duty petitions with the Commerce Department and the ITC.

April 23, 2001 - Antidumping and countervailing duty investigations were initiated, covering a period of investigation from April 1, 2000 through March 31, 2001.

May 18, 2001 - The ITC issued its preliminary determination that the U.S. softwood lumber industry is threatened with material injury as a result of dumped and subsidized softwood lumber from Canada.

August 9, 2001 - The Commerce Department made an affirmative preliminary determination that the provincial governments' sales to lumber producers of timber on public lands at below market prices constitute a countervailable subsidy to Canadian lumber producers. As a result of that determination, Canadian softwood lumber imports were subject to bond or cash deposit requirements based on a net preliminary countervailable subsidy rate of 19.31 percent. As part of its preliminary determination, the Department also made an affirmative preliminary finding that critical circumstances existed based on evidence that lumber producers received prohibited export subsidies and that there were massive imports of the subject merchandise over a relatively short period of time. As a result of the critical circumstances determination, the bond/cash deposit requirements were applied to imports that entered 90 days prior to the publication of the preliminary determination.

October 30, 2001 - The Commerce Department made an affirmative preliminary determination that softwood lumber is being sold, or is likely to be sold, in the United States at less than fair value, *i.e.*, dumped. As a result of that determination, Canadian softwood lumber imports became subject to additional bond/cash deposit requirements based on preliminary antidumping rates ranging from 5.94 to 19.24 percent.

March 22, 2002 - The Commerce Department announced its final countervailing duty determination, finding a final countervailing duty rate of 19.34 percent. As part of its final countervailing duty determination, the Department made a final negative critical circumstances determination, *i.e.*, it made a final determination that critical circumstances did not exist in this case, and it refunded all of the bonds and cash deposits that were posted pursuant to the preliminary critical circumstances determination. The Commerce Department also announced

its final determination in the companion dumping investigation on March 22, finding final antidumping duty rates ranging from 2.26 to 15.83 percent.

April 26, 2002 - The Department reduced the final rates due to clerical errors. The amended final countervailing duty rate is 18.79 percent (down from 19.34 percent) and the amended final antidumping rates range from 2.18 percent to 12.44 percent (down from 2.26 to 15.83 percent).

May 2, 2002 - The ITC announced its final determination that the U.S. industry is threatened with material injury as a result of dumped and subsidized softwood lumber from Canada. Because the ITC found a threat of injury, as opposed to actual present injury, all bonds and cash deposits that were posted pursuant to the preliminary antidumping and countervailing duty determinations were refunded to Canadian producers. The preliminary duties amounted to almost \$1 billion.

May 22, 2002 - The Commerce Department published antidumping and countervailing duty orders on softwood lumber from Canada and instructed the Customs Service to begin collecting cash deposits for countervailing duties at the rate of 18.79 percent and for antidumping duties at rates ranging from 2.18 percent to 12.44 percent. The total duties thus average 27.22 percent.

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